

Brigham Young University Law School BYU Law Digital Commons

Utah Supreme Court Briefs (pre-1965)

1957

Radley v. Smith et al : Brief of Respondents

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Keith E. Sohm; Attorney for Respondents;

Recommended Citation

Brief of Respondent, *Radley v. Smith*, No. 8555 (Utah Supreme Court, 1957).
https://digitalcommons.law.byu.edu/uofu_sc1/2658

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

Asa M. Radley and Ingeborg E. Radley
Klyde A. Petersen and Emma T. Petersen
Jack L. Owen and Wanda Owen
Vern L. Cameron and Violet L. Cameron
Lynn S. Finch and Delona M. Finch
Violet T. Smythe

And

Douglas K. Simons
Plaintiffs - Respondents

Vs.

E. Penn Smith

And

Beth A. Roberts
Defendent and Defendant - Appellant

BRIEF OF RESPONDENTS

Keith E. Sohm
Attorney for Respondents

CASE NO.
8555

FILED

APR 9 1957

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Question Presented	1
Statement of the Case	1
A. Pretrial Order Established Facts	6
B. Pretrial Issues of Fact	7
C. Pretrial Issues of Law	7
D. Stipulations	8
SUMMARY OF ARGUMENT POINTS	9
Argument	
Point I	10
Point II	11
Point III	12
Point IV	15
Point V	18
Point VI	25
Conclusion	25
<u>AUTHORITIES CITED</u>	
Restatement of Contracts, Section 161 and 164	13
Restatement of Contracts, Section 3, 20, 22 and 63	19
Williston on Contracts, Vol. 5, Section 1439 (a)	14
Bucholz V Green Brothers Co., 172 N. E. 161 (Mass.)	17
Cockburn V O'Meara, 155 Fed. 2nd 340	18
De Britz et ux., V Sylvia et al., 150 P 2nd 978 (Wash)	23
Dunshie V Georghegan, 25 P 731	18
Gordon V Curtin Brothers Co., 248 P 158 (Ore.)	23
Housing Corp. V O'Toole, 74 N. E. 2nd 286	17
Matthew V LaPrade, 107 S. E. 795 (Virginia)	18
Thornton V Pasch et al, 139 P 2nd 1002 (Utah)	22

BRIEF FOR PLAINTIFF-RESPONDENTS
Preliminary Statement

This is an action for Breach of Contract and unlawful conversion of money had and received. Defendant, Beth A. Roberts, appealed from judgement entered in the District Court in and for Salt Lake County on the 5th day of May, 1956 which order granted nominal damages (\$1.00) to each Plaintiff, specific performance of the contract by payment of back taxes, costs and attorney's fees. Respondents cross appealed on the grounds that damages were inadequate, particularly in regards to Plaintiffs-Respondents Jack L. Owen and Wanda Owen; that the court failed to grant damages for defendants failure to provide refrigeration; and further failed, in granting damages, to take into consideration defendants failure to maintain halls.

The Questions Presented

1. WHETHER THE CONTRACTS HEREIN INVOLVED ARE VALID, ADEQUATE TO SUSTAIN THIS JUDGEMENT, AND ENFORCEABLE AGAINST APPELLANT.
2. WHETHER THE JUDGEMENT IS BASED ON PLEADING AND SUSTAINED BY THE FACTS AND THE EVIDENCE AND WHETHER JUDGEMENT PROVIDED FOR ADEQUATE DAMAGES.

Statement of the Case

As stated in appellants briefs between the years of 1947 and 1949 most of the respondents

contracted with defendant, E. Penn Smith, to purchase certain apartments in the Salt Lake City apartment house known as the Avalon Apartments. All of the twenty four apartments were sold. Copies of these basically identical contracts are attached to the original complaint (12-26)*. Despite the fact that they were poorly constructed contracts, they were entered into in good faith by both Seller and Buyer, and there is nothing in evidence or pleadings to the contrary. Three of the respondents herein, Asa M. Radley, Ingeborg E. Radley and Douglas K. Simons never contracted directly with E. Penn Smith but rather took their respective interests by assignment.

The contracts after identifying the parties, property and consideration simply states, among other things, that buyer shall pay to seller "\$15.00 per month in advance for hot water, cold water, heat, refrigeration, taxes, and fire insurance" and the seller agrees to "maintain the halls in a clean condition and good repair" and to "keep the building and improvements on said premises insured up to 3/4 of its value and pay said general taxes....." (8 - paragraphs 1, 2, and 3 respectively). The contract further provides for payment by defaulting party of costs, expenses and reasonable attorney's fees "that may arise from enforcing this agreement", and finally states "that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors and assigns

*References except as otherwise indicated are to the numbered pages in the Record of Appeal.

of the respective parties hereto" (9 - paragraphs 3 and 4).'

Initially all parties were pleased with the arrangements and were satisfied with operations under its terms. Both buyers and seller strictly adhered to the terms of the agreement. The buyers made the required payments and seller provided hot and cold water, paid the taxes, and maintained the property. All went well until the year of 1950 when appellant, Beth A. Roberts, purchased the Avalon Apartments and took over rights and obligations of E. Penn Smith as alleged in paragraph 3 of plaintiff's complaint (2) and amended complaint (93) and as admitted in appellant's answer paragraph 3 (42). From this time on there was constant problems and agitation by appellant resulting in the abandonment of about half of these apartments. Twelve families continued to hold their property of which all but one supported the retention of counsel to require compliance by appellant with the contractual agreement. The purchasers did not know taxes had not been paid since 1950 until shortly before the appellants letter of February 4, 1955 (Exhibit No. 3). This letter, like others, previously were sent at the instance of appellant without return address and often undated and unsigned (Exhibit 2, 42 paragraph 6). These letters demanded replies, negotiation and response but did not reveal to whom or to what address response should be made; attempts to contact appellant failed. This action was filed in desperation only after appellant, refusing to reveal herself, cut off refrigeration service, threatened to shut off all utility service

(Exhibit 2, A. Brief 8) and failed to pay taxes for 4 1/2 years which would have resulted in public auction sale of their property March 1956. Respondents also by motion secured a court order to have the operation of the Avalon Apartments administered by Tracy-Collins Trust Co., appellant's own agent, in an attempt to accumulate enough money to pay taxes. Contrary to statements on page 2 and 9 of her brief appellant did not oppose this arrangement apparently believing accumulated funds could be used to pay off her note to E. Penn Smith. This money was not expended for benefit of purchaser but rather the principal expenditures were to appellant's mortgagor and to repair and maintain appellant's apartment, most of which were unrented at that time, so that they could pay their fair share of costs (See Record-Statement of Receipts & Disbursements). Of course none of this money was used to pay off appellant's indebtedness to E. Penn Smith. Accumulated funds are being held both by the court and by Tracy-Collins Trust Co. The Respondents sought to have released some of this money for partial payment in an attempt to avoid tax sale (69). This motion was successfully opposed by appellant.

Fortunately, before final tax sale of the Avalon Apartments, appellant's mortgagor, Josephine Bernstein, paid \$5,929.11 toward total taxes due in amount of \$7,422.76 (161). By such action respondents were temporarily protected from county sale but are at the mercy of mortgagor who may bring foreclosure proceedings against appellant and respondents at any time in which case respondents are without recourse to protect

their interest.

Based on proper pleading and good and valid evidence judgement was entered for appellants for specific performance of the contract requiring appellant to pay taxes. The appellant has refused to pay these taxes. At the instance of respondents and pursuant to an order to show cause, appellant was by order dated October 18, 1956 required to either pay taxes, including amount advanced by Mortgagor, or, in lieu thereof provide a supersedeas bond in amount of \$10,000.00 (139 & 142). Appellant defiantly continues to refuse to comply with the court's order.

Respondents firmly believe, as far as it went, the court ordered properly and that said order is supported by the evidence. Respondents do contend, however, that the court erred in not granting damages for appellant's failure to provide refrigeration, for granting inadequate damages especially as to respondents, Jack L. Owen and Wanda Owen, (135) and failure, in granting damages, to take into consideration appellant's failure to maintain halls.

Respondents are placed in a peculiar position; they do not want satisfaction of judgement delayed on the basis of their cross-appeal for they may lose far more by the delay than they could gain in additional damages. However, if by chance this matter is to be returned to court for new trial, respondents feel the grounds for their cross-appeal should be considered. Respondents pray the Supreme Court to uphold the lower court's order to pay costs,

attorney's fees and taxes so that no further time will be lost but to order a determination of more adequate damages.

Most of the contentions of appellant are defeated by her own stipulations or by the issues limited by pretrial order to which she did not object nor propose amendments. Because of their importance these issues and stipulations are listed in general terms below:

PRETRIAL ORDER FACTS ESTABLISHED BY PLEADINGS, STIPULATIONS, AND ADMISSION.

1. Contracts between respondents and Smith were assigned to appellant prior to acts complained of (102).
2. Respondents have paid defendants or their agents all monies due under purchase provision and monthly provisions of paragraph one of page two of contracts (103).
3. General taxes for 1951 and subsequent years are unpaid (103).
4. Defendant furnished hot water, cold water, heat, and refrigeration until May 1955 at which time defendant-appellant failed and refused to furnish refrigeration (103).
5. The proportionate share for each buyer for taxes and insurance is agreed to be 1/24 of the total (103). Respondents objected to this (106) and court agreed question was a matter of law and not of fact (164).

PRETRIAL ISSUES OF FACT:

1. What is cost and reasonable value of the services furnished plaintiffs for water, heat, and refrigeration from May 1951 to date (103).
2. What amount of damages, if any, have been suffered by plaintiffs as the result of defendant's failure to furnish refrigeration from May 1955 to date (103). Amended to add words "and in the future" (164).
3. What amount of damages, if any, has been suffered by plaintiffs as the result of defendant's failure to pay taxes from 1951 to date (106 and 164). Added at respondents' request.
4. Has the defendant failed to maintain entrance and halls in a clean condition and in good repair, if so, what amount of damages, if any has been suffered by plaintiffs as a result of defendant's failure (105 and 165). Added at Respondents' request.

PRETRIAL ISSUES OF LAW:

1. Is paragraph one page two of the contracts enforceable or does such provision lack mutuality rendering it unenforceable (103).

2. If unenforceable what is the legal effect of defendants' acts in furnishing the services set out and accepting payment under the contracts (103).
3. What is legal effect of defendants' failure to pay taxes (104).
4. What is the legal effect of the defendants discontinuing refrigeration service.
5. What were the duties and rights of the parties generally under paragraphs one and three of page two of the contracts.

STIPULATIONS:

1. That the contracts involved are valid contracts and copies are genuine as attached to complaint (159 and 160).
2. That total taxes due as of 1955 were \$7,422.76; that \$5,929.11 were paid by Mrs. Bernstein leaving a balance, which is the last years taxes, of \$1,493.65 (160).
3. That cross claim of defendant may be dismissed without prejudice (176).
4. That the sum of \$3.25 per month is the reasonable value of furnishing refrigeration service to each unit (176).

The lower court denied respondents' proposed amendment as to what the legal effect would be

if defendant undertook to maintain the building and did so in a negligent manner (106 and 164).

SUMMARY OF ARGUMENT

- I. SINCE THE PLEADINGS PROPERLY ALLEGED AND SET FORTH A CAUSE OF ACTION AGAINST APPELLANT FOR BREACH OF CONTRACT SHE CANNOT CLAIM SURPRISE AND ERROR IN THIS REGARD.
- II. SINCE APPELLANT NEITHER PLEADED NOR OFFERED EVIDENCE AS TO INVALIDITY OR ILLEGALITY OF THE CONTRACTS BUT, IN FACT, STIPULATED AS TO THEIR VALIDITY SHE CANNOT CLAIM COURT ERRED IN THIS REGARD.
- III. SINCE APPELLANT TOOK ASSIGNMENT OF THESE CONTRACTS FROM SELLER AND SAID CONTRACTS SPECIFICALLY PROVIDES THAT ITS STIPULATIONS "APPLY AND BIND" ASSIGNS OF RESPECTIVE PARTIES APPELLANT IS BOUND BY ITS TERMS.
- IV. SINCE VALID CONSIDERATION WAS INITIALLY AND CONTINUOUSLY THEREAFTER DULY PAID APPELLANT MAY IN CASE OF FAILURE, BE REQUIRED TO SPECIFICALLY PERFORM PAYMENT OF TAXES AND INSURANCE, AND MAINTAIN HALLS IN CLEAN CONDITION AND GOOD REPAIR AS THE CONTRACT PROVIDES AND BE LIABLE FOR DAMAGES FOR BREACH OF CONTRACT.

- V. SINCE APPELLANT CONTINUED TO ACCEPT MONEY PROVIDED, PURSUANT TO CONTRACT, FOR "HOT WATER, COLD WATER, HEAT, REFRIGERATION," A CONTRACTUAL OBLIGATION IS CREATED, IF NOT ALREADY IN EXISTENCE, REQUIRING SAID SERVICES TO BE PROVIDED.
- VI. SINCE THE CONTRACTS PROVIDE FOR PAYMENT BY DEFAULTING PARTY OF COSTS, EXPENSES AND REASONABLE ATTORNEY'S FEES "THAT MAY ARISE FROM ENFORCING THIS AGREEMENT" APPELLANT WAS PROPERLY ASSESSED THESE EXPENSES.

POINT I

SINCE THE PLEADINGS PROPERLY ALLEGED AND SET FORTH A CAUSE OF ACTION AGAINST APPELLANT FOR BREACH OF CONTRACT SHE CANNOT CLAIM SURPRISE AND ERROR IN THIS REGARD.

The complaint and amended complaint allege that appellant did fail to comply with the terms of the contracts herein (2 and 94) resulting in a breach of her contractual obligations. Paragraph 7 of said complaint reads as follows:

"7. That on or about the 1st day of May, 1955 defendants breached said contractual agreements by causing refrigeration service to be discontinued; that defendants, in utter disregard

of their contractual obligations with plaintiffs have failed and refused to pay taxes on said property herein described as the Avalon Apartments and, in particular, plaintiff's real property interests therein since the year 1951 converting unlawfully the money of plaintiffs which was paid for the purpose of paying taxes, resulting in a present tax lien of over \$7000.00; that said defendants have failed to maintain halls in clean condition and good repair....."

The appellant was present during pretrial discussions which evolved entirely around the question of her breach of contract as reflected in the Pretrial Order and additions (103 - 106) to which she did not object nor request amendments. Surely she cannot claim surprise or error in this regard.

POINT II

SINCE APPELLANT NEITHER PLEADED NOR OFFERED EVIDENCE AS TO INVALIDITY OR ILLEGALITY OF THE CONTRACTS BUT, IN FACT, STIPULATED AS TO THEIR VALIDITY SHE CANNOT CLAIM COURT ERRED IN THIS REGARD.

Appellant did not plead illegality of the contract in her answer so that question was never brought to issue (42-44). The question

of illegality was never placed in issue by the pretrial order (102-104) nor was any evidence offered to support an argument of illegality. The fact is that appellant even stipulated that the contracts were valid (159, 160). It appears in view of these facts no further argument is necessary in regard to the so-called Rent Acts of 1942 and 1947.

It should also be stated at this time that the fact that the contracts are referred to as a preliminary agreement does not make it any less valid or less enforceable nor does the fact that a trust or corporation was not set up support the appellant's contention in this regard, since it was her responsibility to do that (9). The court also made these observations (170).

POINT III

SINCE APPELLANT TOOK ASSIGNMENT OF THESE CONTRACTS FROM SELLER AND SAID CONTRACTS SPECIFICALLY PROVIDES THAT ITS STIPULATIONS "APPLY AND BIND" ASSIGNS OF RESPECTIVE PARTIES APPELLANT IS BOUND BY ITS TERMS.

As previously stated in this brief, the contracts require the buyer to pay \$15.00 per month whereby seller agrees to "maintain the halls in a clean condition and good repair" and "to keep the building and improvements on said premises insured up to 3/4 of its value and pay said general taxes...." (8). The contract further states "that the stipulations aforesaid are to apply to and bind heirs, executors,

administrators, successors and assigns of the respective parties hereto" (9).

We contend that appellant in accepting assignment of these contracts containing such a provision binding assignees that she expressly assumed performance of the obligations of assignor.

It was stipulated and stated in Pretrial Order as a fact that the contracts between respondents and defendant, E. Penn Smith, were assigned to appellant prior to acts complained of (102) so that is not at issue.

Appellant contends that she did not intend to accept the burdens of the contracts but only the benefits. This is a ridiculous contention for she knew the services required and heretofore furnished by Mr. Smith, she could read what was required in the contract, and, in fact, accepted these obligations of the contract from the beginning as she admits on page 5 of her brief by stating, she "remained in control of the fee and continued to perform all the normal functions of a landlord." Exhibit 3, appellant's letter of February 4, 1955, in the first paragraph contains an admission that for four consecutive years she had been accepting these obligations. Page one of that Exhibit lists expenses incurred by her in performance of her contractual obligation including cost of furnishing water, fuel, and gas, power and refrigeration, insurance and taxes. The Restatement of Contracts #161 states:

"Rights under a bilateral contract can be assigned as effectively as rights under a unilateral contract, but if rights are conditional on the performance of a return promise, no assignment can extinguish or vary materially the condition." Comment (a) Rights created by bilateral contracts are usually conditional upon some performance by the holder of the right, or by some other person, or upon some other event. The right of an assignee is subject to the same conditions as was the assignor's."

Restatement of Contracts #164 states:

"(1) Where a party to a bilateral contract, which is at the time wholly or partially executory on both sides, purports to assign the whole contract, his action is interpreted, in the absence of circumstances showing a contrary intention, as an assignment of the assignor's rights under the contract and a delegation of the performance of the assignor's duties.

(2) Acceptance by the assignee of such as assignment is interpreted, in the absence of circumstances showing a contrary intention, as both an assent to become as assignee of the assignor's rights and as a promise to the assignor to assume the performance of the assignor's duties."

Volume 5 of Williston on Contracts #1439 (a) states in substance that an assignee who has expressly or impliedly assumed performance of a

contract may have it enforced against them.

When appellant took assignment from E. Penn Smith all apartments were sold. Surely we are not expected to believe that she was so naive as to assume she was going to receive monthly contract payment plus \$15.00 per month without paying for heat, water, refrigeration, taxes, insurances and hall maintenance so clearly required by the contract. On the contrary, as we have pointed out, she understood the obligations and undertook performance of them. Without doubt the obligations and duties imposed on seller "apply and bind" his assignee the appellant herein.

POINT IV

SINCE VALID CONSIDERATION WAS INITIALLY AND CONTINUOUSLY THEREAFTER DULY PAID APPELLANT MAY, IN CASE OF FAILURE, BE REQUIRED TO SPECIFICALLY PERFORM PAYMENT OF TAXES AND INSURANCE, AND MAINTAIN HALLS IN CLEAN CONDITION AND GOOD REPAIR AS THE CONTRACT PROVIDES AND BE LIABLE FOR DAMAGES FOR BREACH OF CONTRACT.

The contracts vary in regard to sale price, down payment and monthly payments on the principal (7-26). These payments as well as monthly payments for taxes and utilities have been duly made and there is no issue or question raised concerning these payments the matter having been disposed of by Pretrial Order (103).

The respondents paid this \$15.00 monthly payment to appellant fully intending for it to

cover taxes as well as insurance and utilities as it had always done in the preceding years. It is not material whether or not that sum was adequate to cover all of these services. The fact is that if appellant accepted the money for the purpose of making said payments, she becomes obligated, to so perform, if not by the written terms at least by an implied contract. For what it may be worth respondents have prepared exhibit 5 which is a tabulation of expenses, including taxes. The income from 24 apartments at \$15.00 per month for one year would be \$4,320.00. Exhibit 5 shows:

<u>YEAR</u>	<u>EXPENSES</u>	<u>INCOME</u>	EXCESS OR
			<u>PROFIT</u>
1952	\$3,509.94	\$4,320.00	\$810.06
1953	4,247.05	4,320.00	72.95
1954	3,610.82	4,320.00	709.18
1955	4,231.50	4,320.00	88.50

Even if appellant had some merit to her contention that the monthly payments were not enough she should have applied the money taken in to make payment of taxes and other obligations which were specifically and expressly required by contract. If she chose to apply that money improperly it should not work to the detriment of respondents but amounts to a misappropriation of funds by her. The actual reason she felt she was not receiving enough money to make the required payments is because she was not making payment herself on the 12 apartments which she acquired by forfeiture.

Damages should be allowed for appellant's breach of contract to maintain the halls

resulting in greatly reduced property value. Jack L. Owen and Wanda Owen were forced to trade their property for an automobile of about \$800.00 value (181). The Owens had paid in a total of about \$5,514.68 on their apartment (183, also Exhibit 15). They were forced to move in May, 1955 because of appellants threats to shut off utilities (180) and finally made this trade after advertising and attempting to sell from May to September, 1955 during which time the apartment was vacant. This poor market condition was principally the result of appellant's failure to maintain the halls and pay taxes (184, 191, 195 - 198). Exhibits 6 - 12 show the worn and unsightly condition of these halls. A similar apartment sold for \$4,150.00 in 1949 before this deterioration and tax delinquency occurred (188).

The respondents are entitled to damages sufficient to compensate them for actual loss sustained by them to put them in as good a position financially as they would have been in if there had been no breach and contract completed (*Bucholz v. Green Brothers Company*, 172 N. E. 161 (Mass.)). The case goes on to state that you can recover for those elements of damage which follow as a natural and probable consequence of the breach and such as may be presumed to have been in the contemplation of the parties at the time the contract was made (see also *Housing Corp. v. O'Toole*, 74 N. E. 2nd 286 and 73 N. E. 2nd 200).

Uncertainty as to amount of damages does not prevent recovery, if evidence is sufficient

to enable court to make a fair and reasonable finding in respect thereto. A party who broke the contract cannot escape liability because of lack of perfect measure of damages caused by the breach. It is enough if damages are the direct result of the breach and evidence furnishes sufficient data for approximate estimate of the amount thereof (Cockburn v. O'Meara. 155 Fed. 2nd 340).

In the case of Matthew V. LaPrade, 107 S. E. 795 (Virginia) the court approving an earlier case stated "If the purchaser has paid anything, he is entitled to recover the money paid with interest, and also the sums properly expended by him for examination of title etc.". In the Utah Case, Dunshee V. Geoghegan, 25 P. 731, where the vendor refused or could not convey the land, the vendee recovered amount paid in plus interest and the difference in value between price paid and value at time of breach.

Surely \$1.00 was not adequate damages especially to the respondents Owens for appellant's failure to perform.

POINT V

SINCE APPELLANT CONTINUED TO ACCEPT MONEY PROVIDED, PURSUANT TO CONTRACT, FOR "HOT WATER, COLD WATER, HEAT, REFRIGERATION," A CONTRACTUAL OBLIGATION IS CREATED, IF NOT ALREADY IN EXISTENCE, REQUIRING SAID SERVICES TO BE PROVIDED.

Though the contract requires respondent to pay \$15.00 a month for hot water, cold water,

refrigeration, taxes and insurance it does not specifically spell out a corresponding duty upon appellant to provide hot water, cold water and refrigeration. The contract does, however, by express written terms require appellant to maintain halls and pay insurance and taxes (8).

The contract infers an obligation on the appellant to the extent appellant accepted it as an obligation. By accepting the money, an implied contract is created so that for each month she accepted the money she was obligated to provide the specified service. In this manner there was a manifestation of mutual assent by appellant to pay hot water, cold water heat, refrigeration, taxes and insurance. This position is supported by the Restatement of Contracts and Utah cases.

1. RESTATEMENT OF CONTRACTS VOL. 1 CHAPT. 1

Sec. 3. An agreement is a manifestation of mutual assent by two or more persons to one another.

(b) Manifestation of assent may be made by words or by any other conduct (Sec. 21). Even silence under some circumstances is such a manifestation (see Sec. 72).

Chapter 3.

Sec. 20. Requirements of Manifestation of Mutual Assent:

A manifestation of mutual assent

by the parties to an informal contract is essential to its formation and the acts by which such assent is manifested must be done with the intent to do those acts; (Except as qualified by Sec. 55, 71 & 72) neither mental assent to the promises in the contract nor real or apparent intent that the promises shall be legally binding is essential (underlining added).

(a) Mutual assent to the formation of informal contract is operative only to the extent that it is manifested. If manifestation is at variance with mental intent.... it is the expression which is controlling.

Not mutual assent but a manifestation indicating such assent is what the law requires. It is essential that the acts manifesting assent shall be done intentionally.

Sec. 21. The manifestation of mutual assent may be made wholly or partly by written or spoken words or by other acts or conduct.

(a) Conduct may often convey as clearly as words a promise or an assent to a proposed promise and where no form is required by law a condition of the validity or enforceability of contract there is

no distinction in the effect of a promise whether it is expressed (1) in writing, (2) orally, (3) in acts, (4) partly in one of these ways, partly in others.

Sec. 22. The manifestation of mutual assent almost invariably takes the form of an offer or proposal by one party accepted by the other party or parties.

(a) One party must announce what he will do before there can be any manifestation of mutual assent.

Sec. 63. EFFECT OF PERFORMANCE BY OFFEREE WHERE OFFER REQUESTS PROMISE.

If an offer requests a promise from the offeree, and the offeree without making the promise actually does or tenders what he was requested to promise to do, there is a contract, subject to the rule stated in Sec. 56, provided each performance is completed or tendered within the time allowable for accepting by making a promise. A tender in such a case operates as a promise to render complete performance.

2. THE RESTATEMENT POSITION IS ACCEPTED BY UTAH AND WESTERN COURTS.

A. Thornton v Pasch et.al., Utah 1943

139 Pac. 2nd 1002

Action by Thornton against Pasch for breach of contract plaintiff appeals from adverse judgement. Reversed.

Defendants were in the roofing business. Plaintiff was trucker. Plaintiff bid on hauling 100 carloads of roofing by writing it on a scratch pad for defendants. About a week later defendant told plaintiff's wife that they had contract for plaintiff to sign. Plaintiff came in and signed contract. Neither original nor copy was ever signed by defendants. Contract said, "I hereby agree to furnish labor etc. I agree to unload cars etc. I will submit statements for payments. It is agreed that you will pay me within two days." Defendants said be ready for work May 26. Later defendants called and said he would haul himself. Plaintiff sued for breach of Contract. Defendants claimed no contract. Held for Plaintiff.

Court says: It is well recognized rule of law that where a contract is not required to be in writing, mutual assent or the meeting of minds may be proved by words spoken as well as by acts and conduct. Restatement of Contracts Vol. 1, Chapt. 3 Sec. 21 says: "The manifestation of mutual assent may be made wholly or partly by written or spoken words or by

other acts or conduct." 17 C.J.S Contracts p. 373 Sec. 41 (a) "... as acceptance need not be express or formal, but may be shown by words, conduct, or acquiescence indicating assent to the proposal or offer." Gordon v Curtin Bros. Co. 119 Ore. 55, 248 p. 158, 161 court said, "An assent to an offer, which is requisite to the formation of an agreement, is an act of the mind, and is either expressed or evidenced by circumstances from which such assent may be inferred."

B. De Britz et ux., v Sylvia et al., (Washington 1944) 150 p. 2nd 978.

Action by De Britz against Sylvia on contract. Defendant appeals from judgement for plaintiff Affirmed. Plaintiff signed documents saying, "I do hereby give an option to purchase all my right, title, etc. in a certain lease.

1. Defendant took possession desiring to consummate the purchase of the lease, paid rent etc. but claims he is not bound by option agreement since he did not sign it.

Court says: As option does not bind the optionee to do anything. An option is an offer, which, when supported by a consideration, becomes a contract

for the sale of the property described, at the acceptance of the optionee.

Acceptance may be implied from conduct as well as words. The act of accepting may be neither word nor writing but conduct simply and only. Cites Restat. of Contracts Sec. 21. See page 980.

Court quotes Washington case Voorhees v Nabob C. 24 p 2nd 114. "We have accordingly decided that, under the above statutes, an implied liability arising out of a written instrument is included in the same clause with an express liability arising out of a written contract."

Court says: "This action, then, arises out of the written agreement which, while of itself unilateral in its nature, became binding upon respondent and appellant when the latter elected to exercise his right under the option to take possession of the property covered thereby.

The written instrument is the source and basis of the contract between the parties, which became binding upon each when appellant accepted and acted upon the option."

Respondents contend that the lower court erred in not allowing damages for discontinuance of refrigeration service beginning in May 1955 (102).

It was stipulated that the value of this service was \$3.25 per month (176). This would result in damages of \$39.00 for each of the Respondents owners of 8 apartments.

POINT VI

SINCE THE CONTRACTS PROVIDE FOR PAYMENT BY DEFAULTING PARTY OF COSTS, EXPENSES AND REASONABLE ATTORNEY'S FEES "THAT MAY ARISE FROM ENFORCING THIS AGREEMENT" APPELLANT WAS PROPERLY ASSESSED THESE EXPENSES.

The contract provides for payment by defaulting party of costs, expenses and reasonable attorney's fees "that may arise from enforcing this agreement," and finally states "that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties hereto (9 - paragraphs 3 and 4). Appellant does not argue that these awards were not proper if the judgment generally was proper but merely complains about these awards because she thought she won the case (Appellant Brief 21). Respondents contend that the award of costs and expenses was proper. Counsel for Respondent determined not to introduce evidence as to reasonable attorney's fees but allowed the court to use its discretion on the matter and was award very nominal fees which certainly cannot be considered excessive (120).

CONCLUSION

Since the appellant has failed to show

wherein the lower court erred in its finding of Fact, Conclusions of Law and Judgement and since, on the contrary, the evidence and the law amply supports the court's ruling except as to the inadequate award of damages. Respondents pray the Supreme Court uphold the lower court's order to pay costs, attorney's fees and taxes so that no further time will be lost but to order a determination of more adequate damages. Respondents further pray costs, expenses and attorney's fees be awarded them for purposes of this appeal.

Respectfully submitted,

A handwritten signature in cursive script, reading "Keith E. Sohm". The signature is written in dark ink and is positioned above the printed name.

Keith E. Sohm

Attorney for Plaintiffs -
Respondents